IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

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No. 35

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

TEXTILE WORKERS UNION OF AMERICA, CIO, AND ITS AGENTS EARL McGREW AND FRANK R. METZGER, AND LOCAL 1172, TEXTILE WORKERS UNION OF AMERICA, CIO, AND ITS AGENTS FRANK METZGER, ANTON DVORSCAK, AND FRANK TURK

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## MEMORANDUM FOR THE RESPONDENTS WITH RESPECT TO THE QUESTION OF MOOTNESS

The respondents submit this Memorandum in response to the "Memorandum for the National Labor Relations Board Respecting Mootness."

Respondents are not anxious to continue a meaningless litigation and we would, of course, suggest a dismissal of this proceeding on the ground of mootness if this were required or even consistent with the proper judicial treatment of Board orders.

We are aware, of course, of the certification by the Board of the United Textile Workers of America (herein called the UTW) as the representative of the employees of the Company in the particular plant here involved. But we have not made a suggestion of mootness to the Court. The reason

is not that we necessarily concur in the speculations contained in the Board's memorandum as to the probable developments with respect to the representation of the employees of the Company. The reason is that we believe, wholly irrespective of the considerations mentioned in the Board's memorandum, that such a suggestion would be inconsistent with the proper judicial treatment of Board orders.

A Board unfair labor practice proceeding is essentially a proceeding to determine if the charged party has in fact committed a past violation of the Act. Unlike some other administrative proceedings in which an administrative regulation is promulgated in the proceeding, the Board in unfair labor practice cases concerns itself only with whether the respondent has violated the law as it stands on the books. Indeed, the function of issuing complaints by the General Counsel was analogized by one of the authors of the Taft-Hartley Act to the prosecutor's function in criminal proceedings. See Senator Taft's analysis, 93 Cong. Rec. 6858, 80th Cong., 1st Sess. (1947).

If the Board finds a past violation, then the question of remedy occurs. In certain cases the Board issues remedial orders to correct the infraction of rights which has occurred in the past—as in the case of orders for back pay. In other cases, the Board issues only a cease and desist order or a direction which consists essentially only of an injunction to comply with the Act in the future in the respect in which it has been found that it has not been complied with in the past. Usually, as in this case (R. 91, 78), such orders are accompanied by a direction to post notices.

In many cases it is true that if the courts affirm the adjudication of past violations the order directing future compliance with the Act which results will have little or no practical utility. The essential and important part of the judicial process in such cases is the affirmance or reversal of the adjudication of past violation. This affirmance or reversal

does not constitute an advisory or speculative process—the question is whether, in the particular case and on the particular facts presented, there has or has not been a violation of the Act.

Except in the limited number of cases in which such affirmative action as reinstatement and back pay orders is involved, the primary and significant result of the Board's order is the adjudication of past violation. The Board's order as to future conduct makes no substantive difference whatsoever in the rights of the parties. The respondent who is ordered to cease and desist from certain conduct was, presumably, under a substantive duty to cease and desist from from such conduct in the first place. *N.L.R.B.* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C.A. 2, 1950).

There is, of course, a difference. That difference is that, after an order has been entered and judicially confirmed, this duty can be enforced by a contempt proceeding in the Court of Appeals.

The question of likelihood of recurrence, which is the question to which the Board essentially addresses itself to, is therefore essentially a question as to whether or not there is likely to be such a sequence of events that a contempt proceeding will be invoked. This is a question relating to the propriety of the remedy requested from the courts, or as the Board says, as to whether a decree would serve a "useful purpose," not a question of mootness. And the courts have almost uniformly so treated it in every case in which there has been a change in circumstances between the time of the Board's order and the date of judicial review.

The most familiar examples are those in which the Board's order has already been complied with at the time enforcement is sought. "We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot . . .", *N.L.R.B.* v. *Mexia Textile Mills*, 339 U.S. 563, 567, and cases there cited.

Other examples are the cases, cited by the Board, in which orders directing an employer to disestablish or withdraw recognition from a company union which has already ceased to exist have been enforced.

Perhaps most significant are the cases in which Board orders have been enforced against an employer despite the fact that he has since gone out of business. The Board in its memorandum asserts that these cases all rest on the likelihood of repetition of the past violations and assumes that if it is shown that the probability of such recurrence is remote the cases would be moot. This seems to us plainly wrong. So long as the party to whom the Board's order is directed is still in existence and recurrence is not demonstrably impossible, it seems to us that the Board's adjudication of past violation cannot be moot.

This certainly is the approach illustrated in two cases not cited by the Board. In *N.L.R.B.* v. *Caroline Mills, Inc.* 167 F. 2d 212, 214, (C.A. 5) a Board order to post notices and to reinstate an employee was enforced notwithstanding the employer's allegations that it had gone out of business, that its plant was being dismantled and that its employees had all been dismissed. Of course, said the Fifth Circuit, in a decision not otherwise sympathetic to the Board, if these allegations were true the Court would not hold the employer in contempt for failing to reinstate the employee. But the order, based on the past violations, should, nevertheless, issue. See also *N.L.R.B.* v. *Haspel,* 228 F. 2d 155 (C.A. 2) in which the court similarly disregarded objections to the granting of an enforcement order in these words:

> "There is no merit to respondent's contention that, since the question has been rendered 'academic' by reason of his going out of business, we ought not to grant enforcement of the Board's order . . . The present status of the business is material only on the matter of compliance with our decree, and the Board will nat-

urally not require action now impossible for respondent to perform." 228 F. 2d at 156.

Neither the Board nor a court of appeals (and certainly not this Court) is in a position to assay the probability of future recurrence in each case which comes before it. And certainly no such uncertain prophecy should constitute the basis for a determination as to whether a case is moot.[1]

In this case, for example, we frankly do not know what the likelihood is that the Textile Workers Union of America will again engage in slowdowns and similar concerted activity short of a strike in support of its collective bargaining position with the Personal Products Co. The likelihood of such an occurrence depends not only on our being again the collective bargaining representative of the employees—which can occur as a result of another election, disaffiliation of the local unit of the UTW and affiliation with TWUA, merger of the two international unions, agreement between the two unions short of merger, or in other ways. It depends also on a repetition of the circumstance that the existing collective agreement forbidding such activity has expired, that no agreement can be reached on a new contract, and that the economic situation is such that a slowdown rather than a full strike is deemed the most feasible method of supporting with economic force the union's good-faith bargaining position.

Certainly it is not impossible that such a combination of circumstances should recur. But the probability that it will recur seems to us impossible to estimate. It involves not only speculation based on the closeness of the last vote at this unit, and the progress of merger negotiations be-

[1] For this reason we think the use of mootness language in *N.L.R.B.* v. *Hollywood Maxwell Co.*, 126 F. 2d 815, 823 (C.A. 9, 1942), cited by the Board, as well as in *N.L.R.B.* v. *Reynolds Corp.*, 168 F. 2d 877 (C. A. 5, 1948), not cited by the Board, is erroneous. It is clearly inconsistent with the overwhelming weight of authority.

tween TWUA and UTW—which the Board mentions—but also speculation as to the duration of any contract between UTW and the Company, the impact of the AFL-CIO No-Raiding Agreement, the possibility of an arrangement between UTW and TWUA pursuant to which each of the Unions withdraws its representation claims in favor of the other at certain of the company's plants, the economic prospects in the industry and the area, the potential strength of the union in any future disagreement, and a host of other factors.

We think it is improper to ask this Court to indulge in such speculation. We do not think, in short, that the likelihood of recurrence is the test for mootness. We think that the elements which we have mentioned are relevant, if at all, only to a determination as to whether it is appropriate to issue a cease and desist order if it should be decided that there has been a past violation of the Act. If this Court should find, after argument on the merits, that there has been such a violation—and that is the only question presented to it by the petition for certiorari—then it might be appropriate to remand the case to the Court of Appeals to consider the appropriateness, in the light of the subsequently occurring facts raised in the Board's memorandum, of a cease and desist order, although the cases seem to indicate to the contrary.

But whatever the disposition of that question, it seems to us this case is not moot. The issue of whether or not TWUA violated the Act by engaging in the course of conduct which it did in 1953 is clearly not moot. There is a possibility, whether large or small we cannot say, that the same combination of circumstances which lead TWUA to engage in that course of conduct will recur. If it does, and if the membership so agrees, TWUA may again urge the employees to engage in a similar course of action in

support of the Union's bargaining position. Certainly, we believe, contrary to the Board, that the Union would not violate its duty to bargain if it should do so.

Respectfully submitted,

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